No. 91-527

In the Supreme Court of the United States

October Term, 1991

NATIONAL STEEL CORPORATION,
Petitioner

vs.

Arthur Dale White, James Anderson, James H. Baker, Thomas A. Balon, Richard S. Barber, Larry G. Bell, David S. Bickler, Robert L. Billick, Edward Bittner, Todd A. Blair, Richard Blancato, Robert A. Bray, Jr., Harry V. Brown, Jr., James H. Browning, James William Bullock, Charles A. Clark, Edward Dhayer, Ralph Anthony DiBacco, William R. Duncan, Jr.,Domenic F. Frio, Dorsey R. Garrett, William F. Garrison, James A. Gracie, III, Thomas M. Grishkevich, David R. Harbin, James W. Hazlett, Rena Hess, Phillip E. Johnson, Jerry G. Jones, Robert L. Jones, Joseph P. Karas, Bartley Robert Kirkbride, Lloyd A. Klages, David J. Kondik, Frank W. Kruger, Jr., Charles L. Lacey, Timothy C. Lawson, Ernest H. McCormick, Joseph W. Mayernick, Boley Dale Mermon, Patricia Mlodzik, Charles D. Murray, Dale E. Poole, Charles Prince, Larry C. Riggle, William B. Riggs, Robert J. Ryan, Jr., John S. Sciance, Kenneth M. Seiple, John R. Selmon, Jr., Dennis D. Shirer, Ronald L. Spring, Robert L. Sutton, Frederick C. Tate, Stephen F. Tucker, Hoy L. Van Horn, Frederick R. Welshans, Charles F. West, Donald L. White, John W. Cominsky, Walter F. Mrozek, Dominic A. Tedeschi, Jr.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTION PRESENTED FOR REVIEW

Are claims for breach of an express oral contract to return employees to their former jobs within a bargaining unit pre-empted under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) when the claims, as expressed, do not rely on the Collective Bargaining Agreement?

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STATEMENT OF THE CASE

A. Procedural History

On April 29, 1983, a Complaint was filed on behalf of sixty-two named Plaintiffs against National Steel Corporation ("National Steel") in the Circuit Court of Hancock County, West Virginia. National Steel removed the case to the United States District Court for the Northern District of West Virginia on May 23, 1983. Subsequent thereto, an Amended Complaint was filed.

In November of 1984, Plaintiffs and National Steel began engaging in discovery. This extensive pre-trial discovery continued through 1985 and 1986. As a result of information obtained during discovery, Plaintiffs were permitted to file a Second Amended Complaint. In June, 1987, the Plaintiffs filed Motions for Partial Summary Judgment. National Steel also filed Motions for Summary Judgment against most of the Plaintiffs and their claims.

The District Court held several conference type hearings with counsel in the Summer and Fall of 1988. The Court requested and received extensive supplemental briefs. During these hearings, the Court denied Plaintiff's Motions for Partial Summary Judgment, and with regard to National Steel's Motions for Summary Judgment, the Court denied in part and granted in part these motions. On August 30, 1989, the District Court filed its Opinion which finalized and clarified its previously enunciated tentative holdings and findings.

Consolidated appeals from the District Court were then filed, which were properly before the Fourth Circuit Court of Appeals either pursuant to final judgments entered pursuant to Rule 54(b) or appeals properly taken from portions of the lower court's order which were certified under 28 U.S.C. § 1292(b). The Fourth Circuit, by a unanimous opinion of a three judge panel consisting of Circuit Judges Sprouse and Wilkinson, and District Judge Ellis,

sitting by designation, affirmed in part, reversed in part, and remanded the case to the District Court.

The net effect of the decision of the Fourth Circuit was to have a number of Plaintiffs dismissed from the case. In addition, as to those Plaintiffs that remain in the case, most of their claims have been dismissed, i.e., those sounding in express fraud, constructive fraud, and implied-in-law contracts. In addition, the Fourth Circuit limited the amount of damages that each Plaintiff could claim, by setting a date after which no damages could be collected.

As to the Plaintiffs that remain in the case, the only claim that they have left against National Steel is one for breach of an express oral contract. As to that claim, the Fourth Circuit held that it should not be dismissed based upon the doctrine of federal pre-emption. It is from that holding that National Steel has filed its Petition for Writ of Certiorari.

B. Statement of Facts

1. The Plaintiffs

The Plaintiffs in this case began working at National Steel's Weirton, West Virginia Division as hourly rate laborers or entry level clerks. Their starting dates varied. Some Plaintiffs were hired in the 1950's and others in the 1960's and 1970's. The hourly employees became members of the Production and Maintenance (P&M) bargaining unit of the Independent Steelworkers Union (ISU). The terms and conditions of employment for hourly employees were governed by a collective bargaining agreement which was periodically negotiated between the ISU and National Steel.

Fifteen Plaintiffs were hired or subsequently transferred to clerk positions (i.e., salaried non-exempt employees). Prior to 1976, a non-exempt employee had no job security or protection in written form. In October, 1976, National Steel published and

distributed to all salaried non-exempt employees a booklet entitled the Standard Practice Manual. This manual set forth the terms and conditions of salary non-exempt employment.

In September of 1978, the salaried non-exempt employees at Weirton chose the ISU as their exclusive representative for purposes of collective bargaining. The ISU and National Steel agreed to their first collective bargaining agreement in 1979.

The P&M collective bargaining agreement contained a seniority section. Hourly employees accumulated company, department, sequence and job seniority under the union contract. This accumulated seniority provided Plaintiffs with job security in two respects: first, by allowing them to transfer to better jobs in the hourly ranks and, second, by providing them with a significant measure of protection against layoffs which were based upon Company seniority. Therefore, an hourly employee with many years of service would have little concern regarding layoffs unless such layoffs were tantamount to a plant shutdown.

Likewise, salaried non-exempt employees accumulated seniority under the provisions of the Standard Practice Manual. Since layoffs in the non-exempt ranks were based on Company seniority, a non-exempt employee with sufficient years of service enjoyed a meaningful measure of job security.

At some point during a plaintiff's employment with National Steel, each of the sixty Plaintiffs in Counts 1 and 3 of the Complaint was offered a promotion to an entry level management position as a foreman or supervisor. In virtually every case, a Plaintiff did not apply for the management (exempt) position. Rather, Plaintiffs were approached by supervisors in their department and were asked to consider promotion to an exempt position.

The majority of the Plaintiff were so reluctant to accept a management position, they initially refused promotion. This reluctance was based upon two aspects of the exempt position.

First, management employees were not protected by either the P&M collective bargaining agreement, the salaried non-exempt bargaining contract or, where applicable, the Standard Practice Manual. Second, a foreman's salary was not significantly greater than that of an hourly or non-exempt employee with comparable years of service. In fact, in some cases, promotion meant a reduction in pay.

National Steel's difficulty in convincing talented employees to work as foremen was best described by John G. Redline, who was President of Weirton Steel from 1977 to 1983. Redline testified that it was hard to convince employees with the requisite time and talent to move up to management. "The wage structure was pretty good for hourly people and it is a job that you work eight hours and go home. You don't have to worry about the plant once you are at home which is a lot different than management. In management you are subject to call 24 hours a day. So it was — I think those people that were earning a good livelihood and probably observed the work ethic of the supervisors, were very satisfied with what they had."

At the time they were offered management positions, virtually all Plaintiffs were aware of several practices which the Company had fostered through the years to protect its management employees. First, management employees were routinely returned to their prior hourly or non-exempt positions during management reductions. Second, prior to 1979, management layoffs were determined primarily upon the employee's Company seniority as opposed to management seniority.

Although the Plaintiffs were well aware of said practices when they were offered management positions, most of them, nevertheless, raised specific questions regarding job security in the management ranks. In some cases, these questions were directed to and answered by the departmental supervisor who had offered the Plaintiff the management position. In other cases, a Plaintiff's supervisor directed him to meet with a representative of

the personnel department for an explanation of his rights.

At these promotion interviews, the Plaintiffs who chose to ask, typically asked two types of questions. First, numerous Plaintiffs asked whether they would be allowed to transfer back to their former jobs in the hourly or non-exempt ranks if there was a management layoff or if they did not like the job and/or could not handle it. In fielding these questions, National Steel's representatives knew that if any limitations were placed on a foreman's right to return it would result in a substantial reduction in the number of bargaining unit employees willing to accept promotion to foreman. John Lewis, a Labor Contract Administrator at Weirton during the period 1977-1984, testified that if an impediment in the form of an inability to return to the bargaining unit was placed in front of an individual considering promotion, it would make it difficult to promote people to management. Therefore, Plaintiffs were assured by National Steel that they had the right to elect to return to their hourly or non-exempt positions.

A second type of question frequently asked revolved around the possibility of Plaintiffs losing their many years of Company service, or seniority, if they accepted a management position. They did not want to lose their positions in the event of a management layoff. They asked questions such as "What happens to my Company time?" or "What happens to my seniority?" Although the responses from National Steel's agents varied, each Plaintiff who asked about his Company time was assured that he would keep his Company seniority, and/or management layoffs would be based upon Company time.

Each of the Plaintiffs relied upon the promises and guarantees made to him by National's representatives when they accepted a promotion and left either the hourly or non-exempt ranks. If a Plaintiff had been told that he would not keep his Company seniority and/or that he had no right to return to his hourly or non-exempt position, he would not have accepted the management position by leaving his bargaining unit job.

2. Layoffs of Former Hourly Employees

In the Summer of 1979, National Steel began making preparations for major management layoffs. Several written drafts of policies pertaining to management layoffs were prepared under the direction of John A. McCreary, Vice President of Industrial Relations. The guidelines for salaried exempt layoffs in 1979 utilized the following factors: (1) job performance; (2) importance/priority of function; and (3) *exempt* seniority date. Exempt seniority date is the date a Plaintiff became an exempt employee; i.e., a foreman or supervisor, whereas Company date is the date the Plaintiff began working for the Company as an hourly or non-exempt employee.

When the Plaintiffs were notified by National Steel in 1982 that they were being laid-off, those Plaintiffs with prior experience in the P&M bargaining unit requested to return to their former positions pursuant to the guarantee which had been made to them when they accepted the management positions. Those Plaintiffs were told, at that time, that they could not return to their former positions. The Plaintiffs in question were laid-off based upon their exempt dates.

When National Steel began laying off large numbers of foremen and turn supervisors including the Plaintiffs, the guidelines utilized in the 1982 exempt layoffs were essentially the same as those developed in 1979. Individuals with job performance problems were reduced first and then "[A]ssuming all personnel were satisfactory performers, the exempt seniority date is the next determinant utilized".

At least thirty-one Plaintiffs with prior P&M bargaining unit experience would not have been laid-off from the P&M ranks if they had been permitted to return to their former positions or if they had never left the bargaining unit. Fourteen others may have been laid-off if they returned to their prior P&M positions - or had never left - but their layoff would have lasted a shorter period of time.

3. Layoff of Former SNE Employees

National Steel also laid-off management employees with salaried non-exempt experience in 1982. The 1979 and 1980 collective bargaining agreements between National Steel and the non-exempt bargaining unit of the ISU did not address the right or ability of a foreman to return to his prior position in the non-exempt ranks. In 1979 and 1980, the parties agreed that Section 6.5 of the Standard Practice Manual would apply until other seniority provision were agreed upon. When large numbers of management layoffs began in 1982, Section 6.5 of the Standard Practice Manual was still in effect. Company policy, as set forth in Section E.2.b.(3) of the Standard Practice Manual, provided that an employee who returns to the non-exempt ranks shall have his Company seniority restored with full credit for all time worked in such a position which is excluded from the non-exempt salaried unit.

National Steel did not notify or inform its management employees that it was going to prohibit foreman with salaried non-exempt experience from returning to the non-exempt ranks. Eleven Plaintiffs with non-exempt experience were laid-off in 1982 subsequent to August 20, 1982. These Plaintiffs requested to return to their former non-exempt positions pursuant to the guarantees previously received and they were told that they could not return to their prior non-exempt positions. These eleven Plaintiffs would not have been laid-off if they had been permitted to return to their former positions or if they had not previously relinquished their non-exempt positions.

Forty-one Plaintiffs were ultimately recalled to management positions by National Steel from early 1983 until January 10, 1984. On January 11, 1984, National Steel sold substantially all of the assets of the Weirton Steel Division to Weirton Steel Corporation under an employee stock ownership plan (ESOP). Twelve other Plaintiffs were recalled by the new Weirton Steel Corporation after January 11, 1984. Nine Plaintiffs were never recalled. The claim of the Plaintiffs that remains is for breach of the express

promise by National Steel when each of the Plaintiffs was promoted out of the hourly or salary non-exempt ranks, i.e., that each would be returned to the hourly ranks and that Company seniority would be utilized to determine layoffs.

REASONS FOR NOT GRANTING THE WRIT

A. The Principle of Law to be Applied in the Case is Well-Settled

The sole issue raised in the Petition for Writ of Certiorari filed by National Steel is whether the Plaintiffs' individual breach of contract claims should be dismissed, based upon the doctrine of federal pre-emption under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a). The scope of the federal pre-emption of Section 301 has been addressed numerous times by the United States Supreme Court in the last six years. See, e.g., *United Steelworkers of America v. Rawson*, 110 S.Ct. 1904 (1990); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), *Electrical Workers v. Hechler*, 481 U.S. 851 (1987), *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). As can be seen by the last three Supreme Court decisions on this issue, the principle of law to be applied in a § 301 pre-exemption case is well-settled.

In *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), the issue was whether state law claims for breach of individual employment contracts were completely pre-empted by § 301. In that case, the Plaintiffs were non-union employees who were promised by their employer, Caterpillar, that if a certain facility ever closed, Caterpillar would provide them employment opportunities at other facilities. The facility was eventually closed and Plaintiffs were terminated, without regard to their individual employment contracts.

The Plaintiffs sued in state court for breach of their individual employment contracts. Caterpillar attempted to remove the action to federal court, based upon the doctrine of "complete pre-emption"

and the collective bargaining agreement in effect at Caterpillar. It should be noted that the claims in the *Caterpillar* case are substantially similar to the claims in the present case.

Justice Brennan wrote the opinion for the unanimous Supreme Court. He first reiterated the two-pronged test for pre-emption claims under § 301. He stated that the claims pre-empted are those "founded directly on rights created by collective bargaining agreements and also claims 'substantially dependent on an analysis of a collective bargaining agreement'", citing *Electrical Workers v. Hechler*, 481 U.S. 851, 859, n. 3 (1987). In refusing to find pre-emption under the facts of the *Caterpillar* case, Justice Brennan wrote:

> Respondents allege that Caterpillar has entered into and breached *individual* employment contracts with them. Section 301 says nothing about the content or validity of individual employment contracts (482 US at 394) (emphasis in original)

The next case is *Lingle v. Norge Division, Magic Chef*, 486 U.S. 399 (1988). In that case, a bargaining unit employee filed a wrongful discharge case contending that she had been discharged from employment in retaliation for filing a worker's compensation claim. Her union had also filed a grievance on her behalf. Again, the question of pre-emption was raised. In this case, the Supreme Court considered the second prong of the pre-emption test: dependence on an analysis of a collective bargaining agreement.

Justice Stevens wrote the opinion for the unanimous Supreme Court. In refusing to hold that the Plaintiff's retaliatory discharge claim was pre-empted, he stated, "[R]esolution of the state-law claim does not require construing the collective bargaining agreement." (486 U.S. at 407).

The next case was *United Steelworkers of America v Rawson*, 110 S. Ct. 1904 (1990) which involved a wrongful death action

brought by the survivors of workers who were killed in an underground fire that occurred in a mine in the State of Idaho. As to the cause of action pleaded against the defendant Union, the Plaintiffs alleged that pursuant to a collective bargaining agreement, the Union undertook the responsibility to inspect mines for safety defects and that it had negligently performed those inspections, contributing to the deaths of the Plaintiffs. In this case, the Supreme Court considered the first part of the pre-emption test: i.e., rights founded directly under the collective bargaining agreement.

Justice White wrote the majority opinion, which was joined by four other Justices. In holding that the Plaintiffs' claims were pre-empted, the Court said:

> If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly the enforcement of that agreement and the remedies for its breach are matters governed by federal law. (110 S. Ct. at 1910)

Thus, the two-pronged test for analysis of pre-emption under § 301 is well-established in the opinions of the Supreme Court. This was the test applied by the District Court in this case by Judge Kaufmann. (See generally, Appendix, pp 9a-10a). It was the standard applied by the Fourth Circuit in this case by the unanimous three-judge panel. (See, generally, Appendix, 95a). Indeed, in its Petition for Writ of Certiorari, National Steel admits that "the Fourth Circuit correctly identified the threshold issue presented in this litigation ...." (Petition, p.15).

Nowhere in its Petition for Writ of Certiorari does National Steel request that the two-pronged test for analysis of § 301 pre-emption be modified on abandoned. It is a principle of law that is well-recognized and universally applied, not just by the lower courts in the case, but by all federal and state courts that have addressed the issue.

Accordingly, since the Supreme Court has addressed this issue numerous times in recent years, the principle of law to be applied is well-established, and there is no claim by National Steel that the principle of law should be revised or abandoned, there is no compelling reason for the Supreme Court to grant Certiorari in this case.

B. This is Not a Case of First Impression in the United States Supreme Court

At page 13 of its Petition, National Steel characterizes the issue in this case as "the extent of § 301's preemptive effect on the state law claims of non-bargaining unit employees alleging breach of individual contracts to return them with seniority to their former bargaining unit positions." Admittedly, if the issue in this case is worded so narrowly, then the U.S. Supreme Court has never addressed this issue.

However, the issue in this case is really much broader, i.e., whether a defendant, by alleging that a collective bargaining agreement may have some relationship to a lawsuit which, on its face, is independent of a collective bargaining agreement, may cause the claims to be pre-empted and therefore dismissed, without ever considering the merits of the claim. There is little dispute that the Plaintiffs' claims, each of which arises from an express oral promise of an agent of National Steel, does not rely on the collective-bargaining agreement. The Fourth Circuit commented that "the Plaintiffs contract claims here are also independent of any collective bargaining agreement.... [T]hey depend on independent oral contracts of employment that do not rely on the terms of any collective bargaining agreement." (Appendix, p.98a).

Indeed, the exact issue in the case was addressed by the unanimous Supreme Court in the *Caterpillar* case. Just as in this case, the Plaintiffs in *Caterpillar* alleged breaches of express oral promises concerning job security in the event of layoffs at the plant. In that case, the Court said "that a Plaintiff covered by a

collective bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state law contact rights so long as the contract relied upon is *not* a collective bargaining agreement."[1] (482 U.S. 396) (emphasis in original). The Court, in *Caterpillar*, by a unanimous decision, refused to find federal pre-emption and, as noted by the Fourth Circuit, the facts in *Caterpillar* contain "many similarities to the present one...." (Opinion of the Fourth Circuit, Appendix, p. 97a).

The only claim of each Plaintiff that remains, after the decision of the Fourth Circuit, is breach of an express contract of National Steel promising each Plaintiff a form of employment security in the event of a layoff. As the Fourth Circuit held, these do not arise from the collective bargaining agreement. Nor must the collective bargaining agreement be interpreted by the Court except in one small instance. If any of the Plaintiffs prevail upon their express contract claims, his seniority must be determined, in order to calculate his damages. However, the seniority provision of the collective bargaining agreement will be interpreted in accordance with federal common law, and there is no pre-emption. This exact issue was addressed by the Supreme Court in its unanimous decision in *Lingle*, supra:

> A collective bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state suit is entitled. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state law claim, not otherwise pre-empted, would stand. (486 U.S. at 413) (citation omitted).

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[1] In the prevesent case, the Plaintiffs were not even members of the respective union at the time their claims accrued, and therefore could not assert any rights under the collective bargaining agreement, even if they so desired.

Finally, this case involves over fifty (50) plaintiffs who each assert a slightly different express contract claim against National Steel. Some of the claims relate to former hourly employees and some relate to former salary non-exempt employees. Therefore, if the Supreme Court is interested in resolving the very narrow issue raised by National Steel in its Petition, this is not the best case to do so. The complex fact situation will make it difficult for the Supreme Court to enunciate a clear rule of law which can be applied in later cases.

In fact, since the "full scope of the pre-emptive effect of federal labor contract law remains to be fleshed out on a case-by-case basis". (*Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), a decision by the Supreme Court in this case, given its complex factual situation, would give little guidance to the lower federal courts in future cases.

C. There is surprising unanimity by the federal courts on the issue raised by National Steel in its Petition.

Despite the contention in the Petition for Writ of Certiorari, there seems to be a consensus in the Circuit and District Courts concerning the issue raised in Petition. Those cases that reach a contrary result are distinguishable.

1. Cases that are consistent with the Fourth Circuit Opinion.

In *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), Ford had scheduled a production increase to begin in December, 1983, at an assembly plant in St. Paul, Minnesota. As a result thereof, Ford needed to hire an additional 250 production employees at the plant. By agreement with the United Auto Workers, Ford was required to offer these jobs to certain laid-off Ford employees on a preferential hiring list, whose plants had either been shut down or who were on indefinite layoff. Ford also contacted the Plaintiffs, whose recall rights had expired because of the length of

time they had been laid off, and promised them that they would be hired as permanent employees at Ford. Because they were former Ford employees, they were familiar with the preferential hiring list and therefore they sought repeated assurances that they would not be bumped by any preferential hirees.

In order to convince the Plaintiffs to come to work, Ford told them that the preferential hiring list had been exhausted and that they would not be replaced by preferential hirees. Based on these promises, the Plaintiffs agreed to come to work at Ford. Within ninety (90) days, and despite the express promises by Ford, the Plaintiffs were bumped from their jobs by employees from the preferential hiring list.

In refusing to dismiss the Plaintiffs' claims under the doctrine of pre-emption by federal labor laws, the Eighth Court said:

> [W]e do not think that because Ford had the right to displace appellants under the terms of the collective bargaining agreement, the company also had the right to either misrepresent to appellants the terms and conditions of employment or to avoid contractual or quasi-contractual obligations based upon pre-employment promises. (803 F. 2d at 958).

That language is particularly relevant to the facts in the present case.

The facts in *Malia v. RCA Corp.*, 794 F.2d 909 (3rd Cir. 1986), cert. denied, 482 U.S. 927 (1987) are very similar to those in the present case. Malia was a member of the bargaining unit when he was offered a promotion to a managerial position outside the bargaining unit. As an inducement to accepting the promotion, Malia received higher pay, increased hours and overtime and the option to return to the bargaining unit if Malia was not satisfied with the new position. In less than three (3) weeks, Malia requested a return to his former position, and management refused, even

though such a position eventually became available.

Malia sued, *inter alia*, for breach of his oral contract to return to the unit, a completely separate agreement from the collective bargaining agreement. The Third Circuit held that such a claim was not pre-empted by § 301. The Court said:

> Nothing in the LMRA prevents an individual - whether that individual is to be newly hired or promoted from a bargaining unit - from negotiating an employment contract for a management position. Nor does the LMRA prevent an individual - whether an applicant for new employment or a current employee in a supervisory position - from negotiating for a job in a bargaining unit so long as that employment will be on terms and conditions set forth in the collective bargaining agreement (794 F.2d at 913) (footnote omitted).

Similarly, the Plaintiffs in the present case negotiated an individual contract for a job in the bargaining unit. In other words, if National Steel had kept its promises, the Plaintiffs would have been returned to the bargaining unit, and their employment would have then been in accordance with the terms and conditions of the collective bargaining agreement, including its seniority provisions. Thus, there is no pre-emption.

In *Berda v. CBS, Inc.*, 881 F.2d 20 (3rd Cir. 1989), Judge Becker, who dissented in *Malia*, wrote the unanimous decision for a panel of the Third Circuit. In that case, the Plaintiff alleged that before he accepted a job at CBS, he was promised that he was guaranteed employment with CBS for the reasonably foreseeable future and that his job would not be seasonal or temporary, but rather, a permanent position. Berda then went to work at CBS, joined the union, and five (5) months later was laid-off. He sued, *inter alia*, for breach of his oral contract.

Even though the collective bargaining agreement which

covered the Plaintiff, had a specific layoff provision in it, the Third Circuit held that the oral contract claim was not pre-empted. The Court stated that the Plaintiff's "contract claims are very similar to the Plaintiff's claims in *Caterpillar*" (881 F.2d at 25) "and that the Supreme Court has made clear that Section 301 does not preempt state contract causes of action premised on pre-employment agreements that are advantageous to the employee." (881 F.2d at 26). In the present case, the only difference is that the oral contracts were pre-promotion agreements, not pre-employment agreements.

In *Miller v. Fairchild Industries, Inc.*, 668 F.Supp. 461 (D. Md. 1987) the Defendant publicly promised job security to its employees even as it privately planned to shut down its Hagerstown plant. The Plaintiffs sued Fairchild, *inter alia*, on claims of fraud and misrepresentation when they lost their jobs. Even though the Plaintiffs were bargaining unit employees, the District Court held that the claims were not pre-empted, noting once again that *Caterpillar* is "a case that is factually similar to this one. (668 F.Supp. at 461).

Significantly, in the present case, the Fourth Circuit relied on *Caterpillar* and noted that it was "a case with many similarities to the present one...." (Appendix, p. 97a).

2. Other Cases

In their Petition, National Steel cites several cases that it contends conflicts with the Fourth Circuit's decision in the present case. They are, however, distinguishable. *Holland v. National Steel*, 791 F.2d 1132 (4th Cir. 1986) involved the same layoffs which are the subject of the instant action, and a claim of a right to return to the bargaining unit. However, Holland based her claim on the provisions of the collective bargaining agreement and not on an individual employment contract. Thus, her claim was pre-empted. To lend further support to the position that the *Holland* case is distinguishable to the present one, Judge Sprouse, who was on the panel in this case, wrote the *Holland* decision.

Redmond v. Dresser Industries, Inc., 734 F.2d 633 (11th Cir. 1984) is nearly identical to *Holland*. The alleged right to return to the bargaining unit was based upon the specific terms of the collective bargaining agreement, rather than a separate oral promise.

Kern v. United Steelworkers of America, Local 1688, 669 F.Supp. 701 (M.D. Pa. 1987) cannot be distinguished on its facts. However, it was decided before the Supreme Court decision in *Caterpillar* and the Third Circuit decision in *Berda* and cannot now be considered good law.

The best case for the Petitioner is *Ulrich v. Goodyear Tire and Rubber Co.*, 884 F.2d 936 (6th Cir. 1989), which has facts similar to the present case. The Court held that the state law claims were "inextricably intertwined" with the collective bargaining agreement, and therefore pre-empted. The Sixth Circuit did not discuss *Caterpillar* in its decision.

In addition, and very significantly, the Sixth Circuit did not dismiss all of the claims but rather, allowed the case to proceed "on the merits of their contract and promissory estoppel claims as a matter of federal common law." (884 F.2d at 938). Thus, the claims of the right to return to the bargaining unit were not dismissed in their entirety.

Based upon the surprising uniformity of the decisions in the federal courts, and the binding effect of the *Caterpillar* decision, there is no compelling reason for the grant of Certiorari in this case.

CONCLUSION

For the reasons set forth herein, the Plaintiffs respectfully request this Honorable Court to deny the Petition for Writ of Certiorari.

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